No. 11139

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

COMMERCIAL CASUALTY INSURANCE COMPANY, a New Jersey corporation, *Appellant*,

vs.

LESLIE O. FOWLES, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT

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Appellee, in restating the factual background of the litigation makes the statement on Page 2 of his brief that no offer of payment, either in the amount demanded by the insured or the prorated amount alleged to be due by the insurer, has been made. There is nowhere in the record any evidence whether or not such offer of settlement has been made and appellant believes that the injection of this new fact, for the first time on appeal, is improper. If the appellee determines to inject this irrelevant matter, at this stage of the proceedings, in fairness he should admit that which is a fact, namely, that several offers, in excess of the amount appellant alleges to be due under

the policy, were made to the appellee, in order to settl this case without the necessity of litigation.

I.

NECESSITY OF JURISDICTIONAL AMOUNT IN DE CLARATORY JUDGMENT ACTION.

The appellee under the headings of I. and II. and III. of his brief, at various times indicated that the law is to the effect that the court has jurisdiction to entertain a Declaratory Judgment Action, even though the jurisdictional amount of $3000.00 is lacking. The appellant in his opening brief used no time or space on this point, assuming that it was too well understood to require argument, that the jurisdictional amount of $3000.00 was a prerequisite to the bringing of an action in the Federal Court, regardless of whether or not this action was by virtue of the Declaratory Judgment Statute. Appellee, in making this argument before the Ninth Circuit Court of Appeals has picked the one court, which more than any other, has repeatedly asserted the proposition that they have no power to entertain litigation brought by virtue of the Declaratory Judgment Statute, if the minimum jurisdictional amount is lacking.

A succinct statement of the rule is given by Judge Parker of the Fourth Circuit, as follows:

> "The Federal Declaratory Judgment Act (Jud. Code Sec. 274d, 28 U.S.C.A. Sec. 400) is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the federal courts already have jurisdiction." *Pacific Mutual Life Insurance Co. v. Parker*, 71 F.(2d) 872.

One of the leading cases enunciating the rule of law set forth by the appellant herein was that of *So. Pac. Co. v. McAdoo*, 82 F.(2d) 121, wherein it was definitely held that the statutory amount of $3000.00 was necessary before a Federal court could entertain jurisdiction of an action, despite the fact that the action was brought under the Federal Declaratory Judgment Act. In that proceeding, a case was brought in the Federal District Court under the provisions of the Federal Declaratory Judgment Act, and the court, in deciding that the case must be dismissed for lack of the jurisdictional amount, used the following language.

> "The Declaratory Judgment Act (Jud. Code Sec. 274d, 28 U.S.C.A. Sec. 400 and note) is limited in its operation to those cases which would be within the jurisdiction of the Federal courts if affirmative relief were being sought (citing cases). The mere fact that a declaratory judgment is sought is not, of itself, a ground of federal jurisdiction."

This court, in the case of *Gavica et al. v. Donough*, 93 F.(2d) 173, again affirmed the holding in the case of *So. Pac. Co. v. McAdoo, supra*, and reiterated the statement that the Declaratory Judgment Act cannot endow a district court with jurisdiction which it lacks by reason of the insufficiency of the amount in controversy.

Prof. Borchard in his treatise on Declaratory Judgments, second edition, page 233, says:

> "It is an axiom that the Declaratory Judgment Act has not enlarged the jurisdiction of the courts over subject matter and parties, although it

the policy, were made to the appellee, in order to settle this case without the necessity of litigation.

I.

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Prof. Borchard in his treatise on Declaratory Judgments, second edition, page 233, says:

> "It is an axiom that the Declaratory Judgment Act has not enlarged the jurisdiction of the courts over subject matter and parties, although it

> manifestly opens to prospective defendants—and plaintiffs at an early stage of the controversy—a right to petition for relief not heretofore possessed."

In other words the Federal Declaratory Judgment Act can only apply to causes which the district courts might otherwise be empowered to hear and determine.

> *West Publishing Company v. McColgan*, 138 F.(2d) 320.

As opposed to the above citations, the appellee, in his argument, cites cases enunciating a general principle as to the discretion of the courts to assume or reject jurisdiction in Declaratory Judgment matters, which citations, upon investigation have no relevancy as to the question of whether or not the court may entertain a case where the jurisdictional amount is lacking.

II.

VALIDITY OF POLICY NOT IN ISSUE

The major portion of the appellee's brief is devoted to attempting, by a tortuous process of reasoning, to prove that the appellant has denied the validity of the policy of the insured. This, despite the fact that the pleadings and evidence indicates with clarity the fact that the appellant has at all times admitted the existence and validity of the policy. The reason for the appellee's attempt to misconstrue the cases on this subject is obvious, in that unless he can convince the court that the policy was attacked, he realizes that he clearly falls short of the jurisdictional amount required for federal jurisdiction.

Schedule 8 of the policy relating to hospital indem-

nity provides that the company will pay, among other thing, *the amount for hospital expense.* Obviously if the appellee is treated without expense at a Government Hospital, he cannot prove any hospital expense and hardly can it be said that the appellant is questioning the wording of the policy by objecting to making a payment under this clause, which the appellee himself is not called upon to pay.

1. Question of change of occupation.

There is a standard clause in the policy in suit relating to a modification in the event of the change of occupation of the insured. Again the appellee on Page 13 of his brief makes a strained attempt to show that it would be necessary to construe the policy if it were determined that the insured had changed his occupation. Inasmuch as the lower court did not pass upon this aspect of the case it is not determined necessary to cite cases in support of appellant's contention, but it can be said that there is an unbroken line of cases to the effect that if it is indicated that an insured changes from the classification of occupation set forth in the policy to one in a more hazardous group, he is not entitled to the full indemnity set forth under the terms of the policy, and it makes no difference whether or not, at the time of his injury, he was not actually engaged in the more hazardous occupation to which he had changed. This does not call for any construction of the policy but merely the determination of the disassociated fact of whether or not the assured had actually changed his occupation.

It hardly seems necessary to respond to the argument made on Page 13 of the appellee's brief to the

effect that there was a controversy regarding the insured's disability, when the appellee follows up his argument by admitting that the total disability to the date of trial was stipulated. Even were this not so, the question of whether or not the insured were totally disabled is a factual one. The denial of total disability in a case like this is not a denial of the validity of the policy.

2. Appellee's Argument that policy was attacked.

On page 16 of his brief, the appellee makes the following statement which is the crux of his whole argument and on which he must stand or fall on the question of jurisdiction. The statement is as follows:

> "Where validity of policy is being attacked, the face value of the policy may be added to accrued benefits."

With the foregoing statement, the appellant is in full accord and agrees that if the validity of the policy herein were being denied, that the face value thereof could be added to the accrued benefits. Appellee has failed to indicate one scintilla of proof either in the pleadings or evidence, wherein the appellant has attempted in any way to attack the validity of the policy. All of the following quotations on this subject, in appellee's brief, indicate clearly that they are cases, where the insurance company involved had attempted to lapse, cancel or otherwise cause the forfeiture of the policy, and therefore such citations are not relevant to the case being discussed.

In the case of *Pacific Mutual Life Insurance Co. v. Parker*, 71 F.(2d) 872, quoted on pages 18 and 19 of

the appellee's brief, the quoted section contains the following language:

> "What is asked by the bill is not merely that prosecution of the suits that have been instituted be restrained but also that the policy be *cancelled* and *surrendered.*" (Italics ours)

On page 19 of the appellee's brief, counsel for the appellee, attempts to open the door to jurisdiction by alleging that the amount of this policy which would be payable on death is a subject which should afford the appellee access to the Federal Court, despite the fact that this provision of the policy is not in issue. In support of this odd contention, the appellee on page 19 of his brief quotes Judge Parker in the case of *Pacific Mutual Life Insurance Company v. Parker, supra,* to the effect that death benefits in accident policies come within the state statute prescribing incontestable periods for such policies. This suggestion was made by the insurance companies involved in that case to protect them from being harmed by the running of the period after which the policy would be incontestable, but the following is the language which Judge Parker used in passing upon this subject.

> "The policies here, however, contain no incontestable clause. Reference has been made to sections 7986 and 7987 of the South Carolina Code of 1932, which prescribe an incontestable period of two years for life insurance policies. There is a question as to whether this statute applies to the disability insurance features of policies; but the question need not be answered here, as equity jurisdiction would not exist in any event. If the limitation of the statute be appli-

cable, it is clear that it had already run at the time of the institution of the suit, as the policies were issued in January, 1925, and the suit for cancellation was not commenced until September, 1933. In that case, the policy would have become incontestable before suit, and the company would have no rights as to contestability for equity to protect. If it be not applicable, then there is no limitation on contestability and no reason for equity to intervene lest the policy become incontestable as a result of the company's inaction."

3. Life Expectancy.

Each of the cases cited by the Appellee, in an attempt to show that the life expectancy of the insured could be shown as a basis for future benefits not yet accrued, embrace a set of facts where again the company in question sought to cancel or nullify the policy. No case is cited where the life expectancy of the plaintiff was allowed to be shown where the validity of the policy was not in issue and attempt to cancel had not been made.

No citation is given which indicates that judicial notice will be taken on the life expectancy of the insured, where the policy was not sought to be cancelled and further where there was no evidence of the age of the insured or of his life expectancy produced at the trial.

The appellant has taken this appeal from the decision of the lower court and particularly from that part of the decision which refuses to dismiss this case on the ground that the requisite jurisdictional amount was not involved. Starting on page 27 of his brief,

the appellee goes through the curious procedure of trying to sustain his position by quoting the memorandum opinion of the Judge from whose decision this appeal is being taken. This despite the fact that the memorandum opinion is set out in full in the statement of facts heretofore filed in this court. It is submitted that if the memorandum opinion of the court below, and the judgment based on that opinion, is in error, and the appellant alleges that it is, that this error is not cured by being adopted by the appellee for support of the decision which is being attacked by this appeal.

CONCLUSION

Stripped of its non-essentials, the only contention which is seriously urged in the brief of the appellee is that the validity of the policy involved in this case was being attacked or that the policy was sought to be cancelled and that therefore its future benefits should be added to the amount of the accrued disability at the time of the suit.

It is respectfully submitted that neither evidence nor legal citations have been produced by the appellee which support his position. It is further submitted that the lower court was entirely without jurisdiction to entertain this case and that upon the authority of the cases cited in he opening brief of the appellant, the action should be dismissed.

Respectfully submitted,

WILLIAM J. MADDEN,

RYAN, ASKREN & MATHEWSON,

Attorneys for Appellant.